Center for National Security Studies

Protecting civil liberties and human rights

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Statement by the Center for National Security Studies

Before the

House Permanent Select Committee on Intelligence
on
"Modernization of the Foreign Intelligence Surveillance Act"

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The Center for National Security Studies is a nonpartisan civil liberties organization that was founded in 1974 to ensure that civil liberties are not eroded in the name of national security. The Center seeks to find solutions to national security problems that protect both the civil liberties of individuals and the legitimate national security interests of the government. For more than thirty years, the Center has worked to protect the Fourth Amendment rights of individuals to be free of unreasonable searches and seizures, especially when conducted in the name of national security.

We appreciate the opportunity to submit this statement to the Committee in connection with its consideration of whether and how the Foreign Intelligence Surveillance Act (FISA) should be changed. We have set forth our views on the NSA's warrantless surveillance program and pending legislative proposals in the joint statement submitted by a number of civil liberties groups. We write separately to outline for the Committee the Fourth Amendment's protections that must govern any surveillance of the communications of persons in the United States.

The FISA was enacted to implement those protections applicable to surveillance *conducted in secret* for foreign intelligence purposes: namely a judicial warrant based on an individualized determination of probable cause that the target of the surveillance is a foreign power or his agent. Accordingly we believe that the NSA's warrantless surveillance program described by the President violates the Fourth Amendment (in addition to the FISA itself). We also believe that legislative authorization of warrantless surveillance of persons in the United States, beyond the emergency circumstances now enumerated in FISA would also violate the Fourth Amendment.

Congress's creation of the FISA court eliminated any perceived lack of judicial competence, swiftness, or secrecy that previously led some lower courts of appeal to conclude that they could not enforce the Fourth Amendment's warrant requirement for foreign intelligence surveillance. (Even those courts however, held that such warrantless surveillance must be limited to individuals determined by the Attorney General to be agents of a foreign power.) Because of the existence of the FISA court, there is no longer any rationale for recognizing an

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exception to the warrant requirement for surveillance of persons within the United States. Set out below is our analysis.

"The basic purpose of the [Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasion by government officials." Camara v. Municipal Court of City & County of San Francisco, 387 U.S. 523, 528 (1967). As such, it forbids "unreasonable searches and seizures," and separately provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend IV. The Fourth Amendment's warrant requirement is a separate restriction, in addition to the requirement that all searches—whether conducted with a warrant or not—must be reasonable. See United States v. United States District Court, 407 U.S. 297, 315 (1972) ("Keith"). The Supreme Court has held that electronic surveillance is presumptively subject to that warrant requirement. Subject to only a few exceptions, such surveillance "conducted outside the judicial process, without prior approval by judge or magistrate [is] per se unreasonable." Katz v. United States 389 U.S. 347, 357 (1967) (emphasis added).

Before FISA, the Court did not decide whether there should be an exception to the warrant requirement for foreign intelligence (as opposed to domestic) electronic surveillance. But the Court made clear that such surveillance, while a necessary tool, is "not a welcome development—even when employed with restraint and under judicial supervision" because "[t]here is, understandably, a deep-seated apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens." Keith, 407 U.S. at 312. Thus, "the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards." Id. "Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech." Id. at 320.

Through the warrant requirement, "[t]he Constitution requires that the deliberate, impartial judgment of a judicial officer be interposed" between the citizen and the government. Katz, 389 U.S. at 357. See also United States v. Place, 462 U.S. 696, 701 n.2 (1983). Thus, the Constitution assigns the judiciary a role in protecting the privacy and other liberties of persons in the United States, just as it assigns such a role to Congress. See Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004). The Warrant Clause "is not an inconvenience to be somehow weighed against the claims of police efficiency." Keith, 407 U.S. at 315. Rather, it is "an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers.'" Id. at 316 (citation omitted). The central protection of the Fourth Amendment is the "neutral and detached magistrate." Id. (citation omitted). The Amendment "does not contemplate the executive officers of Government as neutral and disinterested magistrates." Id. at 317. Instead, it "contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised." Id. (emphasis added).

The Supreme Court has recognized certain limited and specifically enumerated exceptions to the warrant requirement. Katz, 389 U.S. at 356-357. In Keith, however, the Court refused to recognize any such exception for domestic security surveillance. It expressly rejected "the Government's argument that internal security matters are too subtle and complex for judicial evaluation" or that "prior judicial approval will fracture the secrecy essential to official intelligence gathering." 407 U.S. at 320-321. Rather, the Court held that the President's constitutional role in ensuring domestic security "must be exercised in a manner compatible with the Fourth Amendment," which "requires an appropriate prior warrant procedure." Id. at 320. The Court was concerned – as it similarly was in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and would be in Hamdi – that "unreviewed executive discretion may yield too readily to pressures to obtain [intelligence information] and overlook potential invasions of privacy and protected speech." Id. at 317. As the Court explained, "[s]ecurity surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of the intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent." Id. at 320.

To be sure, Keith left open whether there might be a basis for an exception to the warrant requirement where electronic surveillance is conducted of foreign powers or their agents for foreign intelligence purposes. Since then, the Supreme Court has never ruled whether permanently secret searches for foreign intelligence purposes are constitutional or whether the warrant requirement can be ignored for such searches. After Keith, the lower courts considering that issue in connection with surveillance conducted before FISA were split. Courts directly addressing the question recognized such an exception in limited circumstances. See United States v. Truong, 629 F.2d 908, 916 (4th Cir. 1980); United States v. Butenko, 494 F.2d 593 (3d Cir. 1974) (en banc); United States v. Brown, 484 F.2d 418 (5th Cir. 1973).[1] But in Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (en banc), a plurality of the D.C. Circuit rejected the notion that electronic surveillance for foreign intelligence activities can be conducted without a warrant. The Supreme Court, however, had no occasion to decide that question, because Congress intentionally sought "to moot the debate" through FISA. H.R. Rep. No. 95-1283, pt. I, at 24. It remains an open question in the FISA court as well. In In re Sealed Case, 310 F.3d at 742, the court in dicta "assum[ed]" without deciding that the President would have inherent authority in the absence of legislation. Nowhere did the court hold that it would be reasonable to dispense with a warrant by a disinterested judicial officer where review by the FISA court is available; rather, the court upheld the constitutionality of FISA's provisions by relying in part on the very protections provided by those mandated procedures. Id. at 736-746.

[1] The limits on warrantless searches placed by the Truong court were significant. The court insisted that the searches must only target foreign powers or their agents, the primary purpose of the search must be to obtain foreign intelligence and not criminal law enforcement and the target of the search must be approved by the Attorney General. Indeed, the court suppressed evidence from a search that had not been so approved. See also United States v. Ehrlichman, 546 F.2d 910, 923 (D.C. Cir. 1976) (holding that "invocation of the claimed foreign affairs exception to the warrant requirement" was no defense for a "high-level" official who authorized the search of the office of Daniel Ellsberg's psychiatrist because "the claim of a foreign affairs exception has consistently been conditioned on specific approval by the President or the Attorney General.").

The very existence of the FISA court demonstrates conclusively that there is no basis for an exception to the warrant requirement. Any such exception may be justified only by "compelling" reasons, Mincey v. Arizona, 437 U.S. 385, 394 (1978), and no such reasons exist. The pre-FISA cases finding an exception are simply inapplicable in a post-FISA world.[2] The cases balance the President's interest in protecting the national security from foreign threats against the impediment of seeking prior judicial approval for electronic surveillance from a district court unfamiliar with and possibly unsuited to foreign intelligence issues. See, e.g., Truong, 629 F.2d at 912-916; Butenko, 494 F.2d at 605. But because these cases involved surveillance conducted before FISA, they did not weigh the requirement that the Executive go to th FISA court to seek a FISA warrant before engaging in such electronic surveillance. In fact, the very concerns the pre-FISA courts cited to justify excusing the President from having to seek prior judicial authorization for foreign intelligence surveillance were addressed and eliminated by Congress when it created the FISA Court. See S. Rep. 95-701, at 9 ("The basic premise of [FISA] is that a court order for foreign intelligence electronic surveillances can be devised that is consistent with the 'reasonable search' requirements of the fourth amendment.").

The Fourth Circuit's decision in Truong is illustrative. There, the court held that "because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence," the courts should not require the executive to secure a warrant from a federal magistrate when it conducts foreign intelligence surveillance in certain circumstances. Truong, 629 F.2d at 914. The court first concluded that judicial oversight by a federal district court would cause unnecessary delay and would "increase the chance of leaks regarding sensitive executive operations." Id. at 913. The court's second concern was that "whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance . . . [f]ew, if any, district courts would be truly competent to judge" the need of the government for certain particular information. Id. at 913-914. Finally, the court cited the President's preeminent authority over foreign affairs as counseling against interference in the President's foreign intelligence activities by means of a judicially imposed warrant requirement. See id. at 914 ("the separation of powers requires us to acknowledge the principal responsibility for the President for foreign affairs").

Each of these identified concerns—avoiding undue delay, the need for secrecy, the competence of the judiciary, and respect for separation of powers—has been carefully and conclusively addressed by the very existence of the FISA court. Thus, regardless of whether these concerns would have justified an exception to the warrant requirement before FISA—and the Center believes they would not have—they provide no such justification now. First, Congress has addressed the issue of delay, by imbuing the FISA court with the power to swiftly consider warrant applications, and by crafting emergency exceptions for exigent circumstances,

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[2] See Testimony of Attorney General Gonzalez Before the Sen. Comm. on the Judiciary, at 27 (Feb. 7, 2006) (transcript available at http://www.washingtonpost.com/ wp-dyn/ content/article/2006/02/06/AR2006020600 931.html) ("I don't think the [Truong] court did a rigorous analysis about how FISA affects the analysis."); cf. United States v. Bin Laden, 126 F. Supp. 2d 264, 272 n.8 (S.D.N.Y. 2000) ("All of the circuit cases finding a foreign intelligence exception arose before the enactment of FISA . . . and are probably now governed by that legislation.").

including a state of war. And, as demonstrated in the recent amendments to FISA following September 11, 2001, Congress remains ready to expand those emergency powers (consistent with the Fourth Amendment) upon a sufficient showing of necessity. Second, the existence of the FISA Court has resolved any lingering concerns over the need to maintain secrecy. To the Center's knowledge, there has never been a leak from the FISA Court regarding any ex parte warrant application requested or issued under FISA. Third, Congress has deliberately created a court that, due to lengthy and staggered terms, will continually maintain the institutional competence necessary to judge the propriety of warrants in the area of foreign intelligence. The FISA court has reviewed—and in the overwhelming majority of instances, granted—many thousands of foreign intelligence warrant applications, and it cannot reasonably be contended that the court and its members are not competent to judge the legitimacy of such warrant requests. Fourth, for the reasons set forth above, separation of powers concerns now counsel solidly in favor of enforcing a warrant requirement.

The need to recognize a warrant requirement for all electronic surveillance of persons within the United States is particularly pronounced, because it is unlikely that the targets of secret foreign intelligence surveillance will ever become aware of the surveillance unless they are subsequently indicted for a criminal offense. Without judicial review in advance of the surveillance, it is unlikely that there will ever be any judicial review of the surveillance. In the domestic criminal context, the targets must be given notice of the search upon the expiration of an order authorizing electronic surveillance. See 18 U.S.C. § 2518(8)(d). As the Supreme Court has noted, these notice procedures "satisfy constitutional requirements." United States v. Donovan, 429 U.S. 413, 669 n.19 (1977) (citing, inter alia, Katz, 389 U.S. at 355-356). In contrast, the only privacy protection that targets of secret foreign surveillance are afforded from executive overreaching is the judicial guardianship of the FISA court. See 50 U.S.C. § 1805(a)(4); 50 U.S.C. § 1801(h); United States v. Belfield, 692 F.2d 141, 148 (D.C. Cir. 1982) ("In FISA the privacy rights of individuals are ensured not through mandatory disclosure [of surveillance logs], but through its provisions for in-depth oversight of FISA surveillance by all three branches of government . . ."); see Address by former Assistant Attorney General Michael Ullman, Conference on Intelligence Legislation, Standing Committee on Law and National Security, American Bar Association (June 26-28, 1980) (stating that "[t]he judge in the FISA proceeding acts, as it were, in loco parentis for a 'defendant' who will seldom, if ever, be a defendant in fact."). Surveillance conducted outside the procedures of the FISA eliminates this safeguard, and instead substitutes the discretion of Executive branch operatives. It is therefore critically important that such secret surveillance be subject to a warrant requirement so that a court can assure the existence of probable cause, the reasonableness of these searches and that minimization safeguards are implemented.

Additionally, the fact that, absent a criminal prosecution, foreign intelligence searches are permanently secret makes them different from the "special needs" cases cited by the government as support for warrantless searches. U.S. Dep't. of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President at 37-38 (Jan. 19, 2006) ("White Paper") (available at http://www.usdoj.gov/opa/whitepaperonnsalegal authorities.pdf). In "special needs" situations, such as automobile checkpoints and student drug-testing, the

person who is searched knows that he has been searched and knows the information that may have been disclosed. See, e.g., Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664-665 (1995) (upholding drug-testing for students participating in school athletics program); Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 449-455 (1990) (upholding checkpoint to screen for drunk drivers).

The person therefore has the ability to challenge the search and vindicate his Fourth Amendment rights. See United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976) (finding that "[r]outine checkpoint stops" were reasonable because "a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review."); see also Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 399 (1971) (holding that a "traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment"). Individuals subjected to "special needs" searches may also use other methods to address potential negative consequences of the search, such as seeking to expunge or clarify the seized information. Individuals subjected to secret electronic surveillance have no such opportunity, see 5 U.S.C. § 552a(k)(1) (exempting properly classified material from disclosure under the Privacy Act of 1974), even though electronic surveillance reveals significantly more personal information than special needs searches, and that information may be retained in various government files and used to the detriment of the person searched in various ways.[3]

As noted, all the factors and justifications potentially counseling against requiring the President to seek prior judicial approval for foreign intelligence surveillance by a federal district court are absent when the President can seek such approval from the FISA court. By contrast, the concern that the Executive can and will infringe, even inadvertently, on the privacy and free speech rights of Americans, is ever constant. Even the Department of Justice admits that the NSA program "implicates a significant privacy interest of the individual whose conversation is intercepted" and that "the individual privacy interests at stake may be substantial." White Paper, supra, at 40. The potential for abuse of civil liberties is particularly acute in the realm of foreign intelligence gathering, because the perceived stakes are higher, the Executive acts with the utmost secrecy, and foreign intelligence officers are less accustomed than law enforcement officers to the privacy concerns presented by the Fourth Amendment. The warrant requirement exists precisely so that neutral and detached magistrates—in the area of foreign intelligence surveillance, the members of the FISA court—will ensure that executive officers in fact possess probable cause for a contemplated search and that the search is appropriately limited. The NSA's secret, warrantless program lacks these critical protections. And because of the secrecy of this surveillance, there is no way for anyone to know if probable cause in fact exists and the search is reasonable.

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[3] The Foreign Intelligence Court of Review noted that "wiretapping is a good deal more intrusive than an automobile stop accompanied by questioning." In re Sealed Case, 310 F.3d at 746. Wiretapping is also more intrusive than standardized drug tests in schools because students have a diminished expectation of privacy in school, they may opt out of participating in the programs that require testing and the tests only detect the presence of drugs. See Vernonia, 515 U.S. at 655-657.

Not only are the very persons who may be impinging on the privacy rights of Americans unilaterally judging the reasonableness of their own actions, they have, until recently, done so without any public knowledge or scrutiny of their activities. But even assuming for the sake of argument that these intelligence officers are safeguarding personal liberties with the greatest of care—an unverifiable assumption—the Constitution still requires prior review of their judgments by a disinterested magistrate. See Katz, 389 U.S. at 356 ("It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not a judicial officer."). "[A] governmental search and seizure should represent the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizens' private . . . conversations." Keith, 407 U.S. at 316. When the disinterested judgment of the neutral magistrate is eliminated, all that is left is "unreviewed executive discretion." Id. at 317.

The Fourth Amendment thus undergirds and reinforces FISA's requirement that the government obtain a warrant in order to engage in foreign intelligence surveillance of persons in the United States.[4] Any concerns potentially counseling against enforcing the warrant requirement in the foreign intelligence realm have been absent for the better part of thirty years, and the threat to individual liberties by an unchecked Executive is, if anything, magnified in the current environment. Accordingly, there is no basis for permitting the President to conduct surveillance of persons within the United States without a warrant based on individualized probable cause, outside the narrow emergency exceptions in the FISA.

[4] The Center recognizes that there may perhaps be extraordinary circumstances where the warrant requirement must be dispensed with because meeting the requirement would prevent the President from repelling an imminent or ongoing attack. But the program described in the Department of Justice White Paper clearly does not constitute such a circumstance. Indeed, no program of warrantless surveillance, as opposed to warrantless surveillance in a rare "ticking bomb" situation, can ever pass muster under the Fourth Amendment.